
Wisconsin Legislative Council

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Director



TO: REPRESENTATIVE MICHAEL SCHRAA

FROM: Steve McCarthy, Senior Staff Attorney, and Tom Koss, Staff Attorney

RE: Employer-Mandated COVID-19 Vaccines and Eligibility for Unemployment Benefits

DATE: August 24, 2021

You asked whether an employer may require employees to receive a COVID-19 vaccine. You also asked whether employees who choose not to comply with an employer's vaccination requirement and terminate employment are eligible for unemployment benefits. An employer may require employees to receive a COVID-19 vaccine as a condition of employment, when necessary for the health and safety of the workplace, subject to reasonable accommodations for disabilities and religious beliefs. Additionally, employees who terminate employment in lieu of complying with a vaccination requirement are not eligible for unemployment insurance benefits.

EMPLOYER AUTHORITY

State law does not prohibit or require employee vaccinations.¹

In guidance that is specific to the pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) has stated that employers may require workers to be vaccinated against COVID-19, if nondiscrimination and other laws are followed. Accordingly, an employer may make its own determination on steps to reduce safety risks, including mandating vaccines, if the requirement is job-related and consistent with business necessity. [U.S. EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (updated May 28, 2021).]

The emergency use authorization (EUA) for some COVID-19 vaccines could raise some potential legal uncertainty, as it does not provide full federal approval. However, the U.S. Department of Justice (DOJ) has stated that the EUA status does not prohibit public or private entities from imposing vaccination requirements. [U.S. DOJ, [Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization](#) (slip opinion, July 6, 2021).]²

¹ Employer-mandated vaccines are common in health care settings for diseases such as influenza and hepatitis B. For a list of vaccinations that are recommended for health care personnel, see Centers for Disease Control and Prevention (CDC), [Recommended Vaccines for Healthcare Workers](#) (May 2, 2016). For information on states' immunization laws for health care personnel, see CDC, [Vaccination Laws](#) (February 28, 2018).

² Note that on August 23, 2021, the U.S. Food and Drug Administration granted full approval to the Pfizer-BioNTech COVID-19 vaccine for individuals age 16 and older.

Similarly, a U.S. District Court decision in the Southern District of Texas has held that the EUA status relates only to the responsibilities of the U.S. Department of Health and Human Services, and does not expand or restrict an employer's responsibilities.³ [*Bridges v. Houston Methodist Hosp.*, Case No. 4:21-cv-01774 (June 12, 2021).]

Under this structure, an employer is generally responsible for its own workplace safety policies. A decision to require vaccinations as a condition of employment would require an assessment as to whether the presence of an employee who is not vaccinated would pose a direct threat to the workplace, considering factors such as community spread, the nature and severity of the potential harm, and the work environment. [29 C.F.R. s. 1630.2 (r).]

REASONABLE ACCOMMODATIONS

Both state and federal law protect an employee from discrimination that is based on the employee's race, sex, disability, religion, or other protected characteristic. Under those principles, an employer must attempt to make reasonable accommodations for a person who declines a COVID-19 vaccination for reasons of disability or religious beliefs. These laws apply to both private and public employers. [Title VII of the Civil Rights Act of 1964; and Title I of the Americans with Disabilities Act (ADA).]

The determination of a "reasonable accommodation" for an employee depends upon the nature of the disability or religious practices, and the hardship an accommodation might pose for the employer. A fact-specific determination must be made on a case-by-case basis to determine whether an employer must accommodate a particular employee by allowing that employee to be exempt from a requirement or providing an alternative accommodation. A determination will depend on factors such as the nature of the disability or religious practices, the employee's work duties, and the potential impact of an accommodation on the employer's operations.

If an individual's presence would pose a direct threat to workplace safety, and reasonable accommodations for a disability or religious beliefs would impose an undue hardship on the employer's operations, an employer may exclude the employee from the workplace.⁴ In assessing whether to terminate an employee for whom reasonable accommodations are not possible, an employer must also follow other rights in the employment relationship, such as disciplinary procedures under an employee handbook or civil service program, employer-provided leave time that may be available to the employee, or leave under the Family and Medical Leave Act.

UNEMPLOYMENT INSURANCE BENEFITS

Under Wisconsin law, an employee who becomes unemployed through no fault of his or her own is generally eligible for unemployment benefits. However, an employee who is discharged by an employer for misconduct or substantial fault is not eligible for unemployment benefits. Likewise, an employee who voluntarily terminates work is generally not eligible for unemployment benefits, except in some

³ The court found that all other claims made by the plaintiffs against a vaccination requirement also failed. Specifically, the court held that the vaccination requirement was not coercive and did not violate Texas employment law, and that the Nuremberg Code does not apply.

⁴ Under the ADA, an employer may terminate an employee who cannot comply with a qualification standard, such as a COVID-19 vaccination requirement, if the standard is applied to all employees, is job-related, and consistent with business necessity, and the employee's inability to comply with the standard poses a direct threat to the health or safety of the employee or others in the workplace that cannot be eliminated or reduced by reasonable accommodations. [U.S. EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (updated May 28, 2021).]

limited circumstances identified in the statutes. As described below, an employee who quits a job due to an employer's COVID-19 vaccine requirement would likely be considered to have been discharged for misconduct or substantial fault and the provisions that allow a person to quit a job and maintain eligibility for unemployment benefits generally would not apply.⁵

Termination by Employer for Substantial Fault or Misconduct

An employee who is terminated for substantial fault or misconduct is generally not eligible for unemployment benefits until seven weeks have passed since the end of the week the termination occurred and the employee has earned the equivalent of 14 times the employee's weekly unemployment insurance benefit rate. [s. 108.04 (5), Stats.]

Substantial fault by an employee includes an employee's acts or omissions that violate the employer's reasonable requirements. [s. 108.04 (5g), Stats.]

Misconduct by an employee includes behavior that shows a willful or wanton disregard of an employer's interests, including deliberate violations or disregard of standards of behavior that an employer has a right to expect of employees. [s. 108.04 (5), Stats.]

Given the EEOC's guidance and existing court decisions that employers may reasonably require employees to become vaccinated against COVID-19 when necessary for the health and safety of the workplace, if nondiscrimination and other laws are followed, it is likely that an employee's refusal to do so would constitute substantial fault. Similarly, it is likely that an employee's refusal to comply with a vaccination policy would constitute intentional disregard of an employer's expected standards of behavior of its employees and of the employer's interests in setting workplace safety policies.

Voluntary Termination by Employee

An employee who voluntarily leaves employment is generally not eligible for unemployment benefits. However, a person who quits may be eligible for unemployment benefits in certain circumstances. For example, a person may be eligible after voluntarily quitting if the separation from employment was due to a family illness, relocation with an active duty spouse, or unaddressed sexual harassment, or because the person had been directed to violate state or federal law. [s. 108.04 (7), Stats.]

In only one circumstance, related to a person's own disability, could an employee quit due to an employer's vaccine requirement and potentially be eligible for unemployment benefits. In particular, under the exceptions, an employee may be eligible for unemployment benefits if the employee's disability or verified illness left the employee with no reasonable alternative but to quit. As noted above, even under ADA protections, an employee who cannot receive a COVID-19 vaccination for reasons of disability may be terminated, if the vaccination policy is applied to all employees, is job-related and consistent with business necessity, and the employee's inability to comply with the standard poses a direct threat to the health or safety of the employee or others in the workplace that cannot be eliminated or reduced by reasonable accommodations. An employee who has such a disability, and is terminated

⁵ Note that LRB-4392/1, which has been circulated for co-sponsorship, proposes to create a new exemption to the limits on receiving unemployment benefits for an individual who terminates his or her work due to the employee's unwillingness, as a condition of continued employment, to receive a vaccine against the SARS-CoV-2 coronavirus or furnish proof of having done so. The bill also provides that an employee's unwillingness, as a condition of continued employment, to receive a vaccine against the SARS-CoV-2 coronavirus or furnish proof of having done so, does not constitute misconduct or substantial fault for the purpose of receiving unemployment benefits.

under these limited circumstances or quits because there is no reasonable alternative, would likely be eligible for unemployment benefits. [s. 108.04 (7) (c), Stats.]

Generally, if an employee quits and none of the conditions for an exception apply, the employee is not eligible to receive unemployment benefits until the employee earns six times the employee's weekly unemployment insurance benefit rate. [s.108.04 (7) (a), Stats.]

SUMMARY

An employer may require employees to receive a COVID-19 vaccine as a condition of employment, when the standard is job-related and consistent with business necessity, subject to reasonable accommodations for disabilities and religious beliefs. Additionally, an employee who is discharged or voluntarily terminates employment due to a vaccination requirement is generally not eligible for unemployment benefits.

Please let us know if we can provide any further assistance.

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